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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

WHITAKER WRIGHT, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL for the southern district of New York, et al. } No. 661.

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

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I.

"MADE CRIMINAL BY THE LAWS OF BOTH COUNTRIES."

That principle is inherent in all extradition treaties, whether expressed or not. This is obvious because of the reciprocal nature of such engagements and the existence and similarity of crime in all places, whatever the differences as to definition and incidents of any particular crime. All countries and races, under every language and legal system, know the crimes of murder, burglary, arson, etc., under some designation; and when there is a convention to surrender

it is evident that the interest and contract are mutual, and that each jurisprudence takes cognizance of such offenses. Phillimore says (International Law, Vol. I, p. 413, ed. of 1854) that in all cases of extradition the act done on account of which extradition is demanded must be considered as a crime by both States. This passage was quoted by counsel and the principle recognized by the court in the Windsor case. Treaties plainly imply the doctrine, but do not ordinarily express it. Such is the force of the phrase "mutual requisitions," and the meaning of the requirement of evidence of criminality according to the law of the place of arrest, as justifying trial, "if the crime or offense had there been committed." (Art. X of the Webster-Ashburton treaty)

When different systems are to be adjusted the treaty often contains a definition. Thus our treaties with civil-law countries specify the inclusions in the crime of murder under their codes, or define burglary by our own law, and also by the translation of the foreign description of that crime. (Treaties with France of 1843 and 1845, with Italy of 1868, with Belgium of 1882.)

Such cautions are necessary; international agreements are weighty matters; their precise meaning must be clear. Nations are slow to enter into extradition engagements, and naturally limit the direction and extent of the obligation. They treat respecting serious crimes; they exclude political offenses. In view of the universal right of defense, it must fairly

appear that an offense comprehended in the contract has in fact been committed. On the other hand, technical differences, the importance of names may be exaggerated; and it is on diligent and scrupulous inquiry as to the differences that treaties have failed of effect.

Therefore, as confidence between nations has grown, the liberal view of extradition treaties as effectuating common and proper purposes emphasizes the broad, essential correspondences, and minor technical distinc tions and the mere designation or description of crimes have less weight.

For example, in *Grin* v. *Shine* it is evident that if the act charged was an offense by the law of Russia and also by the law of California, it made little difference that under refined analysis the act might be a form of embezzlement in one place and a form of larceny in the other. It was, after all, criminal by the laws of both countries. It is to be noted in passing that the treaty with Russia does not contain that phrase in its enumeration of offenses. The same idea appears in *United States* v. *Bryant* (167 U. S., 104). There the essential criminal character of the transactions was regarded, although in one country or the other, under different counts and aspects, the thing done might be larceny or embezzlement or forgery.

I submit that the following ideas should guide and govern all extradition inquiries—that the charge has been deliberately and authoritatively made by a responsible and friendly civilized power; a strong presumption of verity and good faith attaches; the matter

is of the highest comity and reciprocal concern; the accused person is the demanding Government's offender, and under their charge it is to be presumed that he is seeking covert refuge in the country of arrest and is a fugitive from justice. The nature of the subject fairly requires a modification, so far, of the presumption of innocence; that presumption revives in full force in the trial jurisdiction. I do not suppose we would treat in extradition with a country wherein the theory of innocence until guilt is established did not have a certain recognition, or at least wherein there was any assumption of guilt until innocence is proved.

When we ask for delivery of a person charged with the commission of a crime here, it is because our authorities are convinced that in substance and essence a serious offense appears and we are entitled to try our own evildoer. We are bound to presume the same conviction and good faith upon the part of our neighbors. Let the defenses appear and due resistance be made and all rights be invoked in the trial jurisdiction; the only real inquiries upon demand for surrender are whether a complaint under the treaty is authoritative, deliberate, and bona fide; whether there is sufficient to commit for trial; whether there is probable cause fairly construed; whether, in other words, the demand is earnest and substantial, or merely experimental and without real merit.

Under common legal inheritances the United States and England, by mere enumeration, denote with espe-

cial accuracy and a complete mutual understanding the scope of the various major offenses. As statutory enactments in each country enlarge or qualify the contents of common-law crimes, the new meaning is recognized, if not adopted, in the other country.

Violent and inconsistent changes are not to be presumed, and the general tendency is the same in both countries. The suggestion is volunteered that in proceedings to extradite for arson, for example, England would recognize our claim, although the strict conditions of the common-law definition had been enlarged, in order to extend the remedy, in the particular State of the Union where the crime was committed. A higher idea of comity pervades the entire field, and the drift is, I think, to recognize and include under existing treaties statutory redefinitions of old offenses.

It is true that when there is proper reason to doubt whether the generic term should embrace a particular variety, the treaty is specifically supplemented. Thus "manslaughter when voluntary" went into the convention of 1889 with Great Britain. It may well be that claims as for murder had been made, which, involving life, emphasized the right of defence and the duty of close scrutiny in the jurisdiction of arrest; and so, those escaping delivery who had at least committed voluntary manslaughter, that offence was properly and explicitly added to the treaty.

Now, offenses falling generally under the head of fraud and breach of trust have only in recent times come within the reach of criminal law. They are in-

numerable in variety and are hard to define and grasp. It is not very long since they were visited only with civil liabilities and penalties in the way of damages. It is often still difficult to establish their criminal character, and laws affecting them differ widely.

Embezzlement was the first of the type to emerge in definite penal form, and the evolution has associated fraud and breaches of trust, in their changing aspects, with larceny, embezzlement, and forgery. But it is clearer all the time in modern life that the fraud group of offenses is very serious and destructive, and requires prompt and thorough repression.

Looking, then, at the treaty of 1889 in the light of the foregoing discussion, no phrase was needed to explain the crimes of murder, burglary, etc., nor to express the necessity of criminality in both countries. They *are* criminal in both countries without that. Piracy must be "by the law of nations," because, in view of marked local differences, it was not desired to contract for a larger or different meaning. So as to the slave trade, "against the laws of both countries;" this was a criminal matter, of course, but there were, or had been, some peculiar local aspects, and the agreement was carefully restricted to the elements held in common. Some suggestion of reasons, not existing, of course, in 1889, will be found in the argument and Lord Cockburn's comments thereon in the Windsor case, referring to the situation here prior to the civil war. Similar and more modern reasons for the express restriction can be divined. The misgiving seems to have been

whether some strange and inconsistent offense might not be included under the particular designation by the laws of one country. (*Vide* argument in Windsor case as to piracy and slave trade.)

The point is the same, under treaties with England (cl. 10 of Art. I of treaty of 1889) and various other nations (e. g., clause 12, Art. II, treaty with Belgium of 1882; first paragraph, Art. II, treaty with Russia of 1887) respecting attempts to commit crime and participation. The contracting parties did not desire to engage, as to those secondary and accessorial matters, unless both countries definitely recognized criminality.

What, then, is the difference as to clause 4 of the treaty of 1889 with England (~~clause 10, Art. I, treaty of 1889~~) respecting fraud by bailee, etc.? Simply this: As to that class of offenses, not yet completely established as criminal, the two powers decline to engage respecting species still carrying a mere civil liability, and therefore the phrase "made *criminal* by the laws of both countries" was used. Nevertheless, although so far restrictive, the implications remaining are enlarging, and were so intended. Provided the particular variety is *criminal* in both jurisdictions, exact correspondence is not necessary. The essence and substance are to be regarded, and highly technical considerations fall away. Otherwise there is no stopping place short of the contention that the object and phraseology of the respective statutes must be substantially the same. And that contention is inconsistent with the importance of checking a line of analo-

gous offenses of elusive and protean character, and with the modern liberal view of extradition obligations.

As to the Windsor case—it is and always was true that the determination of our own courts as to what are the laws of *our* country is of paramount authority, and our decisions are unanimous on the point involved. The Windsor opinion was rendered by eminent judges, it is true; but at that period the more liberal and cordial view of extradition had not much affected either governments or courts. It is to be remembered that the offense was not, apparently, a crime in England at all; that the decision was rather that the New York law was novel and exceptional in denominating false entry as forgery, than that the law was not a law of this country; that in suggesting it was not part of the "general law," it is possible that the learned court failed to keep in mind the fact that for most crimes and misdemeanors, substantially for all offenses against private rights, we must look to the laws of the States and not to Federal laws; and that, having a law of the place where the offense was committed before them, it was perhaps a proper assumption for the court to make that the "general law" here, the law of other component sovereignties of this nation, corresponded in substance with the New York law, whatever the law of England was. The rather extreme view which Lord Cockburn was inclined to take is indicated by his question to counsel for this Government, suggesting that if the law of New York made pocket picking murder, that would not make it so by general law.

In seeking to apply the foregoing ideas to the law

of New York presented on this appeal I submit at the threshold that the commissioner's jurisdiction on the merits ought not to be withdrawn by the accused's writ of habeas corpus and appeal to this court at the present stage. I submit, further, that other parts of the code of New York may be pertinent and ought to be examined and considered here or by the commissioner. Doubtless counsel for the demanding Government will offer to the court's notice and deliberation all relevant portions of the New York penal code. I proceed, then, to analyze section 611, paragraph 3, of that code, which is identical with section 603 of the corresponding code of 1882. The treaty specifies fraud as the basis of surrender; the British statute denounces the making, etc., with fraudulent intent, of false statements or accounts of a public company which are known to be false; the New York law provides that if an officer or director of a corporation knowingly makes or concurs in making a false statement of its affairs or pecuniary condition, he is guilty of a misdemeanor. When the object of the New York statute, its language, and the evil to be remedied are carefully considered, there can be no reasonable doubt that it is an exact analogue of the English law. Literal identity is not to be expected. Knowledge and falsity fully appear, and considering the subject-matter, fraudulent intent is a necessary inference from those two facts. The publication of a company statement known to be false is likely to deceive people to their hurt, and that situation is tantamount to fraud and fraudulent intent.

Both fraud and the *scienter* are there on the face of the statute. If the New York law can punish even where there is innocent mistake, then it goes further than the British statute and fully embraces the latter's terms. And where fraud appears in fact and such fraud could be punished under the New York law, the ingenious argument of counsel crumbles and there is room for common sense as well as dialectics. Both statutes denominate the offense a misdemeanor; that the punishment is greater in England can make no difference.

I add finally on the point that the "laws of both countries" include the laws of all the component parts of each, that when the intention is otherwise there is an express reservation. In the treaty of 1887 with the Netherlands the engagement is to deliver for the specified offenses "committed within the respective jurisdiction of the United States of America or the Kingdom of the Netherlands, *exclusive of the colonies thereof.*" Manifestly the italicised phrase refers only to the Netherlands, and the contention that the laws of its colonies were the laws of that country would not arise under that treaty. In the case of Greene and Gaynor, decided by the Canadian court adversely to this Government and now pending for determination of the proper proceedings for review, there is no doubt that the Canadian laws were invoked and applied by the court under the treaty as part of the laws of Great Britain.

II.

BAIL.

It must always be borne in mind in considering the so-called inherent elements of the authority to take bail that it is not a question of absolute *right* in a defendant, but of *power* and discretion in the courts. On this subject as well as other branches of extradition, State laws and analogies drawn from them must be excluded. The United States law permitting or directing bail to be taken, refers and is limited to crimes and offenses against the United States. That restriction is plainly expressed, and *Rice* v. *Ames* so holds respecting a different point—"the section [1014] is confined to crimes or offenses against the United States" Since sections 1014 and 1015 were originally in the same section of the law (sec. 33, judiciary act of 1789; 1 Stat., 73, 91), the words "*all arrests in criminal cases*" in section 1015 necessarily relate back to the words "any crime or offense *against the United States*" in section 1014.

Not only is there no affirmative authority, then, for taking bail in extradition, but section 5270 directs commitment to jail, "there to remain," etc., when the evidence is deemed sufficient to sustain the charge. It will not do to say that the greater power includes the less, that a magistrate who may finally discharge may enlarge on bail pending proceedings.

And in this connection, it may be suggested that a committing magistrate has the power, after a full and final hearing, to absolutely discharge one accused in a

capital case, though manifestly such magistrate would not have the power, under the laws of this country, to enlarge a person accused of such crime, on bail preliminary to such hearing.

In the particular and peculiar subject of extradition a magistrate must look forward to possible surrender, and must guard his custody so that the contract may be performed. That does not mean to assume guilt. It is the natural penalty of accused persons who place themselves in such relation to two governments whose good faith toward each other is paramount over individual inconvenience. If bail were taken and the accused returned to a State where his offense was not a crime, would the enforcement of return not be at least difficult and doubtful? Would this Government or the demanding government take the bail bond and pursue him? In case of failure to locate and retake, would the enforcement of the bond in the courts and the collection of its amount meet the international demand and proprieties? It is matter of common knowledge that recently a high official of a Western city, under indictment and held to bail, resisted return in two States where he had fled, and was finally retaken after proceedings in interstate rendition proceedings. There the State claiming him could show that he had violated her laws; in the extradition case the State of original arrest could show no such thing.

In answer to the suggestion that the sureties might retake the accused should he escape into another State, we respectfully submit that the law does not repose in

them any such power. The bondsmen of a party enlarged on bail manifestly would have no greater power over the person of their principal in a foreign jurisdiction than a sheriff would have over the person of a prisoner arrested under a warrant and escaping into another State. In both cases interstate rendition proceedings must obviously be resorted to.

In *Gorsline's case* (21 How. Prac. Rep., p. 85) there was a warrant of arrest in process of execution to take an offender from one county to the county in which he had been indicted. It was held that "no justice of the Supreme Court, or other magistrate or officer out of that county, has authority, in my opinion, to take him from custody." There is a distinction between the two cases, of course, since in extradition there is intermediate inquiry and the original warrant may not lead to the final executive warrant to surrender to the rightful jurisdiction; but the theory and principle are the same. Hence the following quotation from the Gorsline case is apposite:

> It is urged, however, that under the habeas corpus act (3 R. S., 5th ed., p. 883, sec. 58) this prisoner should now be let to bail. That section provides for a case *where the party has been committed.* Gorsline has not yet been committed, but is held under arrest by virtue of process, which requires that he be taken to Fulton County, where he may be committed, let to bail, or discharged, according to law.

Referring again to the case of Gaynor and Greene, they were not admitted to bail. The fact that the custody of the sheriff ordered by the court was construed

after a liberal, not to say lax fashion, makes no difference whatever.

I submit with respect that on both propositions the views and conclusions of the circuit court should be sustained.

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